

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 606 OF 2014

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
19,20,21,25,27,28,29,31,33,35,43,45 AND 46 OF THE CONSTITUTION OF KENYA
(2010)**

BETWEEN

L.A.W.....1ST PETITIONER

**KENYA LEGAL AND ETHICAL
ISSUES NETWORK ON HIV & AIDS (KELIN)2ND PETITIONER**

**AFRICAN GENDER AND
MEDIA INITIATIVE TRUST (GEM)3RD PETITIONER**

AND

MARURA MATERNITY & NURSING HOME.....1ST RESPONDENT

**COUNTY EXECUTIVE
COMMITTEE MEMBER IN CHARGE
OF HEALTH SERVICES – NAIROBI COUNTY.....2ND RESPONDENT**

**CABINET SECRETARY, MINISTRY OF HEALTH.....3RD RESPONDENT
THE HON. ATTORNEY GENERAL.....4TH RESPONDENT**

AND

**THE SECRETARIAT OF THE JOINT UNITED NATIONS
PROGRAMME ON HIV/AIDS (UNAIDS SECRETARIAT)...1ST AMICUS CURIAE**

PROFESSOR ALICIA ELY YAMIN2ND AMICUS CURIAE

**NATIONAL GENDER
AND EQUALITY COMMISSION (NGEC)3RD AMICUS CURIAE**

AND

**THE INTERNATIONAL COMMUNITY
OF WOMEN LIVING WITH HIV(ICW).....INTERESTED PARTY**

PETITIONER’S LIST OF AUTHORITIES AND CASE DIGEST

No.	
1.	<p>Robbed of Choice: Forced and Coerced Sterilization of Women Living with HIV in Kenya.</p> <p>“healthcare providers, both doctors and nurses in some health facilities are violating the reproductive rights of [women living with HIV] by coercing or forcing them to accept unwanted surgical sterilization procedures. Family members, especially spouses and parents, have also participated in coercing or forcing [women living with HIV] to be sterilized, often based on misinformation provided by trusted medical professionals about the need for sterilization. Further, consent was routinely sought when the patient was in a vulnerable position, especially while in labour pains just about to go for a caesarean section. ... The study illuminates how the intersection of low socio-economic status, HIV and gender exacerbates vulnerability of [women living with HIV] to non-consensual contraceptive sterilization.</p> <p>“The impact of non-consensual sterilization on the women’s physical, emotional and personal lives and their socio-economic status was evident. [Women living with HIV] reporting forced and coerced sterilizations endure immense physical, psychological and social trauma due to the permanent loss of the ability to give birth. Reported health complication post-tubal ligation including severe abdominal and back pains has negatively affected the active lives of these women who are mainly casual workers who rely on their physical fitness to earn a living. However, it was beyond the scope of the study to establish if the reported post-tubal ligation complications were as a result of the procedure of progression of the illness or both”</p>

	Pg11
2.	<p>Chester v Afshar 920040 UKHL:</p> <p>“A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes. It tends to avoid the occurrence of the particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient.”</p> <p>Pg 14</p>
3.	<p>P B S vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016) eKLR:</p> <p>“[U]nless it is an emergency, [a doctor] obtains informed consent of the parties before proceeding with any major treatment, surgical operation, or even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortious liability....”</p> <p>Pg 14</p>
4.	<p>Castell v De Greeff 1994(1) SA 408 Ackerman J held:</p> <p>where a medical provider alleges that consent has been procured prior to it performing a procedure, then the following requirements must, inter alia, be satisfied:</p> <p>“(a) the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk;</p> <p>(b) the consenting party must have appreciated and understood the nature and extent of the harm or risk;</p> <p>(c) the consenting party must have consented to the harm or assumed risk;</p> <p>(d) the consent must be comprehensive, that is extend to the entire transaction, inclusive of its consequences.”</p>

	<p>“It is clearly for the patient, in the exercise of his or her fundamental right to self-determination, to decide whether he or she wishes to undergo an operation, and it is in principle wholly irrelevant that the patient's attitude is grossly unreasonable in the eyes of the medical profession: the patient's right to bodily integrity and autonomous moral agency entitles him or her to refuse medical treatment”.</p> <p>Pg 15, 28</p>
<p>5.</p>	<p>CNM v Karen Hospital Limited [2016] eKLR:</p> <p>“Informed consent refers to consent given with the full knowledge of the risks involved, probable consequences and the range of alternatives available. We hasten to add that there is a big difference between consent and informed consent. ...</p> <p>In medical treatment, requiring invasive procedures, the doctor or health care personnel is required to disclose sufficient information to the patient to enable the patient to give an informed consent. Informed consent for HIV testing means that the person being tested for HIV agrees to undergo the test on the basis of understanding the testing procedures, the reasons for the testing, and is able to assess the personal implications of having or not having the test performed. The requirement of informed consent is intended to uphold the dignity of the patient. It proceeds on the theory that the patient does not lose his dignity simply because he has fallen sick or because he does not know what his treatment will entail, which treatment option is better than the other, or others, and what risks are associated with any or all the available treatment options.” [Emphasis added.]</p> <p>Pg 16</p>
<p>6.</p>	<p>LM, MI & NH v the Government of the Republic of Namibia [2012] NAHC 211</p>

	<p>that it “should be obvious that the required consent must be given freely and voluntarily and should not have been induced by fear, fraud or force. Such consent must also be clear and unequivocal.</p> <p>Pg 16</p>
7.	<p>Government of the Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19.</p> <p>The decision to undergo sterilization:</p> <p>“must be made with informed consent, as opposed to merely written consent. Informed consent implies an understanding and appreciation of one’s rights and the risks, consequences and available alternatives to the patient. An individual must also be able to make a decision regarding sterilization freely and voluntarily.”</p> <p>“whether the woman has the capacity to give her consent for sterilization at the time she is requested to sign consent forms. Therefore, it is not decisive what information was given to her during antenatal care classes or at the moment she signed the consent form if she is not capable of fully comprehending the information or making a decision without any undue influence caused by the pain she is experiencing.”</p> <p>“Individual autonomy and self-determination are the overriding principles towards which our jurisprudence should move in this area of the law... these principles require that in deciding whether or not to undergo an elective procedure, the patient must have the final word.”</p> <p>“obtaining the consent for sterilization of women living with HIV while they were in labor or in exchange of other medically necessary treatment violated the right to be free from cruel, inhuman and degrading treatment, among other fundamental rights.”</p> <p>Pg 17, 28, 32</p>

<p>8.</p>	<p>The National Family Planning Guidelines 4th Edition (2010):</p> <p>“Informed consent must be obtained and the client must sign a standard consent form for the procedure. ...</p> <p>[Tubal ligation] is a permanent [family planning] method (reversal cannot be assured). Hence, a client <u>needs thorough and careful counselling before she decides to have this procedure. A consent form must be signed by the client in all cases before the procedure is undertaken.</u>” (emphasis ours)</p> <p>Pg 19</p>
<p>9.</p>	<p>The National Family Planning Guidelines for Service Providers 6th Edition:</p> <p>“[Informed consent is] the communication between client and provider that confirms that the client has made a voluntary choice to use or receive a medical method or procedure. Informed consent can only be obtained after the client has been given information about the nature of the medical procedure, its associated risks and benefits and, other alternatives. Voluntary consent cannot be obtained by means of special inducement, force, fraud, deceit, duress, bias, or other forms of coercion or misrepresentation.”¹ It is further stated that “informed consent must be obtained and the client must sign a standard consent form for the procedure”</p> <p>Pg 19</p>
<p>10.</p>	<p>The International Federation of Gynaecology and Obstetrics (FIGO) Guidelines on female contraceptive sterilization adopted in June 2011</p> <p>“under human rights provisions and the professional codes of conduct, it is unethical and in violation of human rights for medical practitioners to perform procedures for prevention of future pregnancy on women who have</p>

	<p>not freely requested such procedure, or have not previously given their free and informed consent.</p> <p>Only the women themselves can give ethically valid consent to their own sterilization. Moreover, their consent should not be made a condition of access to medical care, such as HIV/AIDS treatment, natural or caesarean delivery, or abortion, or of any benefit such as medical insurance, social assistance, employment, or release from an institution. Consent to sterilization should also not be requested when women are vulnerable, such as when going into labour or in the aftermath of delivery.”</p> <p>“In obtaining informed consent, take measures to ensure that an individual’s decision to undergo sterilization is not subject to inappropriate incentives, misinformation, threats or pressure. Ensure that consent to sterilization is not made a condition for access to medical care (such as HIV or AIDS treatment, ...) or for any other benefit (such as medical insurance, social assistance...).</p> <p>Where women face contraindications to pregnancy, offer sterilization as one possible method from the full range of contraceptive options available. There are no legitimate medical or social indications for contraceptive sterilization. As sterilization for the prevention of future pregnancy is not a matter of medical emergency, ensure that the procedure is not undertaken, and consent is not sought, when women may be vulnerable and unable to make a fully informed decision, such as when requesting termination of pregnancy, or during labour, or in the immediate aftermath of delivery</p> <p>Pg 20</p>
11.	<p>Samuel Rukenya Mbura & Others V Castle Brewing Kenya Limited & Another [2006] eKLR</p> <p>Considering the import of section 74 of the retired Constitution, defined inhuman or degrading treatment as including “an action that is barbarous,</p>

	<p>brutal and cruel” while degrading punishment is “that which brings a person in dishonor or contempt”.</p> <p>Pg 30</p>
12.	<p>Resolution 260: Resolution on Involuntary Sterilization and the Protection of Human Rights in Access to HIV Services, the Commission:</p> <p>“firmly declares that all forms of involuntary sterilization violate in particular the right to equality and non-discrimination; dignity, liberty and security of person, freedom from torture, cruel, inhuman and degrading treatment, and the right to the best attainable state of physical and mental health; as enshrined in the regional and international human rights instruments, particularly the African Charter and the Maputo Protocol”</p> <p>Pg 31</p>
13.	<p>General Comment No 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) (2017),</p> <p>described forced or coerced sterilization as:</p> <p>“a form of sexual and gender-based violence that amount[s] to a form of torture and other ill-treatment in view of the specific, traumatic and gendered impact of sexual violence on victims, including the individual, the family and the collective.”</p> <p>Pg 31</p>
14.	<p>ICCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)</p> <p>has stated that State Parties to the ICCPR have an obligation to ensure the protection dignity and the physical and mental integrity of the individual. The Human Rights Committee stated further that article 7 expressly prohibits medical or scientific experimentation without the free consent of the person</p>

	<p>concerned. That prohibition in article 7 of the ICCPR relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.</p> <p>Pg 32</p>
15.	<p>ICCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women),</p> <p>the Human Rights Committee, has advised that in order to comply with article 7 of the ICCPR, and to allow the Committee to assess such compliance, state parties ought to provide the Committee information on measures to prevent forced abortion or forced sterilization.</p>
16.	<p>Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (Feb 3, 2013),</p> <p>the Special Rapporteur emphasized that forced sterilization is an act of violence, a form of social control, and a violation of the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment. The Special Rapporteur further noted that “international and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender. <u>Examples of such violations include abusive treatment and humiliation in institutional settings; involuntary sterilization...forced abortions and sterilizations.</u>”</p> <p>Pg 33</p>
17.	<p>V.C. v. Slovakia (Application No. 18968/07)</p> <p>The Court notes that sterilization constitutes a major interference with a person’s reproductive health status. As it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual’s personal integrity including his or her physical and mental well-being and</p>

	<p>emotional, spiritual and family life. It may be legitimately performed at the request of the person concerned, for example as a method of contraception, or for therapeutic purposes where the medical necessity has been convincingly established.</p> <p>However, in line with the Court’s case-law referred to above, the position is different in the case of imposition of such medical treatment without the consent of a mentally competent adult patient. Such a way of proceeding is to be regarded as incompatible with the requirement of respect for human freedom and dignity, one of the fundamental principles on which the Convention is based.</p> <p>Similarly, it is clear from generally recognised standards such as the Convention on Human Rights and Biomedicine, which was in force in respect of Slovakia at the relevant time, the WHO Declaration on the Promotion of Patients’ Rights in Europe or CEDAW’s General Recommendation No. 24 ... that medical procedures, of which sterilisation is one, may be carried out only with the prior informed consent of the person concerned. The same approach has been endorsed by FIGO [...]. The only exception concerns emergency situations in which medical treatment cannot be delayed and the appropriate consent cannot be obtained."</p> <p>“‘Private life’ is a broad term, encompassing, inter alia, aspects of an individual’s physical, psychological and social identity such as the right to personal autonomy and personal development, the right to establish and develop relationships with other human beings and the right to respect for both the decisions to have and not to have a child.”</p> <p>Pg 34, 39</p>
18.	A.N.N v Attorney General [2013] eKLR

	<p>where the court held that Article 28 of the Constitution “makes it clear that the protection of the dignity of all human beings is at the core of the protection of human rights under the Constitution.”</p> <p>Pg 36</p>
19.	<p>Barkhuizen v Napier [2007] ZACC 5:</p> <p>“Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity”</p> <p>Pg 37</p>
20.	<p>Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14 the court held that “...the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity.”</p> <p>“Regardless of one’s status or position, or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. Consequently, doing certain things or acts in relation to a human being, which have the effect of humiliating him or her, or subjecting him or her to ridicule is, in my view, a violation of the right to dignity protected under Article 28.”</p> <p>Pg 37</p>
21.	<p>Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services, the Commission has stated that:</p> <p>coerced sterilization is a form of involuntary sterilization characterized by the use of financial or other incentives, misinformation, or intimidation tactics to compel an individual to undergo the procedure declares that all forms of involuntary sterilization violate in particular the right to equality and</p>

	<p>non-discrimination, dignity, liberty and security of person, freedom from torture, cruel, inhuman and degrading treatment, and the right to the best attainable state of physical and mental health.</p> <p>Pg 38</p>
22.	<p>GSN v Nairobi Hospital & 2 others [2020] eKLR this Court held that “Although the Section 70(c) of the repealed Constitution is restricted in its wording, it is necessary to interpret it as broadly as possible in order to ensure that all aspects of an individual’s privacy are protected. This is the only way to ensure compliance with the international law on human rights. The protection of the right to privacy is integral to democratic governance. As such, I would do a disservice to the Petitioner to limit the application of the provision to the vocabulary used by the drafters of the provision. In that regard, I hold that the right to privacy under the repealed Constitution can and should be interpreted broadly to include the personal privacy of an individual and the privacy of their information.”</p> <p>Pg 38</p>
23.	<p>Tom Ojienda t/a Tom Ojienda & Associates Advocates V Ethics and Anti-Corruption Commission & 5 others [2016] eKLR,</p> <p>“privacy is a subjective expectation of privacy that is reasonable, inner sanctum helps achieve a valuable good-one’s own autonomous identity. Privacy is not a value itself but it is valued for instrumental reasons, for the contribution it makes to the project of ‘autonomous identity’. This protection in return seeks to protect the human dignity of an individual.”</p> <p>Pg 39</p>
24.	<p>CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)</p>

	<p>‘the right to privacy encompasses instances where women are subject to medical procedures without their informed consent, and gives as an example, instances where there are general requirements for the sterilization of women.’</p> <p>Pg 40</p>
25.	<p>UN InterAgency Statement in Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO:</p> <p>“The right to respect for privacy and family life includes being able to find out about whether or not sterilization has been performed, and the precise procedure used. <u>Lack of access to their medical records makes it hard for individuals to get information about their health status or receive a second opinion or follow-up care, and can block their access to justice.</u>”</p> <p>Pg 42</p>
26.	<p>General Comment No. 14: The Right to the Highest Attainable Standard of Health and General Comment No. 22 (2016) on the Right to sexual and reproductive health:</p> <p>the CESCR defines reproductive health as including “the freedom to decide if and when to reproduce; the right to information, and to have access to safe, effective, affordable and acceptable methods of family planning of their choice.” The right further includes the right to access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth. Due to the far-reaching effects of sterilization by way of bilateral tubal ligation, informed consent is an integral component in terms of provision of the service.</p> <p>Pg 43</p>
27.	<p>CESCR General Comment No. 14</p>

	<p>has stated that the right to health includes the freedom to “control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.”</p> <p>‘The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, <u>and access to health-related education and information, including on sexual and reproductive health.</u>’</p> <p>Pg 43, 45</p>
28.	<p>General Recommendation No 24, Article 12 of the Convention (women and health) (1999)</p> <p>calls on State Parties to provide health services “that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. As such, States parties should not permit forms of coercion, such as non-consensual sterilization,”</p>
29.	<p>Teachers Service Commission v WJ & 5 others [2020] eKLR is apposite, wherein it was stated that “In addition, the fact that their psychological well-being was affected is a clear violation of their right to health, which is defined as including the highest attainable standard of physical and mental well-being.”</p> <p>Pg 46</p>
30.	<p>Peter K. Waweru v Republic [2006] eKLR this Court defined discrimination as:</p>

	<p>“affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, color, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored. <u>From the above authorities it emerges that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex creed etc. or due to unfair practice and without any objective and reasonable justification.</u>”</p> <p>Pg 47</p>
31.	<p>In Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 others [2013] eKLR²:</p> <p>It noted “beyond dispute that the right to information is at the core of the exercise and enjoyment of all other rights by citizens. It has been recognised expressly in the Constitution of Kenya 2010, and in international conventions to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution.”</p> <p>Pg 53</p>
32.	<p>Brummer v Minister for Social Development 2009 (II) BCLR 1075 (CC)</p>

	<p>stated that “the right to information is at the core of the exercise and enjoyment of all other rights by citizen and access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights.”</p> <p>Pg 54</p>
33.	<p>P.A.O & 2 Others v Attorney General [2012] eKLR</p> <p>reaffirmed the nexus between the right to dignity, the right to health and the right to life in the following terms:</p> <p>“In my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life is in jeopardy, and where one has an illness that is as debilitating as HIV/AIDS is now generally recognized as being, one’s inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised.”</p> <p>Pg 56</p>
34.	<p>Villagran Morales et al. v Guatemala, Series C, No. 63, 19 Nov. 1999 the Inter-American Court of Human Rights held that:</p> <p><u>“The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.”</u></p> <p>Pg 57</p>

<p>35.</p>	<p>Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others Petition No 65 of 2010</p> <p>“In this regard, the obligations of the State and its Organs are clear cut it must “observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights” The very raison d'etre of the State is the welfare of the people and the protection of the people's rights and it is its obligation, under international and national laws, to ensure that human rights are observed, respected, and fulfilled, not only by itself but also by other actors in the country. For this purpose, it can and should regulate the conduct of non-state actors to ensure that they fulfil their obligations.”</p> <p>“It is on this basis that it behooves upon me to direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines. These guidelines would tell those who are minded to carry out evictions what they must do in carrying out the evictions so as to observe the law and to do so in line with the internationally acceptable standards. To that end, I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions maybe carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in Articles 9 and 10 of the Constitution.”</p> <p>Pg 60, 69</p>
<p>36.</p>	<p>C.K. (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others [2013] eKLR</p>

	<p>The Court held that: “The State’s duty to protect is heightened in the case of vulnerable groups such as girl-children and the <u>State’s failure to protect it need not be intentional to constitute a breach of its obligation.</u>”</p> <p>“In the instant case the police owed a Constitutional duty to protect the petitioners’ right and that duty was breached by their neglect, omission, refusal and/or failure to conduct prompt, effective, proper and professional investigations and as such they violated the petitioners’ fundamental rights and freedoms as entrusted in the Constitution..... the Police failure to effectively enforce Section 8 of the Sexual Offences Act, 2006 infringes upon the petitioners right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010 and further by failing to enforce existing defilement laws the police have contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.”</p> <p>Pg 61</p>
37.	<p>Zimbabwe Human Rights NGO Forum v Zimbabwe 245/2 Comm. No. 245/02 (2006) stated that:</p> <p>Human rights standards do not contain merely limitations on State's authority or organs of State. <u>They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others.</u> Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.”</p> <p>Pg 62</p>
38.	<p>Velásquez Rodríguez v Honduras Resolution No. 22/86, Case 7920,</p>

	<p>Asserted that there is state responsibility even for the actions of private individuals. It stated that a State "has failed to comply with [its] duty ... when the State allows "private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”</p> <p>Pg 63</p>
<p>39.</p>	<p>Daniel Ng’etich & Others v The Attorney General & Other [2016] eKLR:</p> <p>“That the 4th respondent [The Cabinet Secretary for Health] does, in consultation with county governments, within –Ninety (90) days <u>from the date hereof, develop a policy on the involuntary confinement of persons with TB and other infectious diseases that is compliant with the Constitution and that incorporates principles from the international guidance on the involuntary confinement of individuals with TB and other infectious diseases.</u>”</p> <p>Pg 70</p>
<p>40.</p>	<p>Prakash Singh & Ors v Union Of India And Ors the Supreme Court of India delivered.</p> <p>The Court held that: “Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issue of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations.”</p> <p>Pg 72</p>

41.	<p>Dick Joel Omondi v Hon. Attorney General [2013] eKLR:</p> <p>“It is now settled law that a party whose constitutional rights are found to have been violated by the state is entitled to damages. The quantum of damages is in the discretion of the Court, taking into account the nature of the violations.”</p> <p>Pg 74</p>
42.	<p>Isaacs v Pandie, [2012] ZAWCHC 47,</p> <p>The High Court of South Africa in 2012 found the applicant had been sterilized without informed consent and awarded damages for past medical expenses, general damages, future medical expenses and loss of earnings in the amount of R410,172.35. It is noteworthy that while the underlying legal finding was overturned on appeal, the quantum of damages was not reviewed.</p>
48.	<p>Muir v The Queen in right of Alberta, 132 D.L.R. (4th) 695</p> <p>Awarded a woman who had been subjected to sterilization without her informed consent \$375,280³ (Canadian dollars). In reaching this amount the Court awarded the plaintiff \$250,280 for her pain and suffering and awarded her aggravated damages in the amount of \$125 000 because of the stigma and humiliation she experienced as she had been sterilized ostensibly due to an intellectual disability.</p> <p>Pg 75</p>
49.	<p>Wachira Weheire v Attorney-General [2010] eKLR (Miscellaneous Civil Case 1184 of 2003)</p> <p>This Court made an award of Kshs 2,500,000.00 to a petitioner whose rights to liberty and freedom from cruel, inhuman and degrading treatment were violated.</p>

	Pg 77
50.	<p>Michael Rubia v Attorney General [2020] eKLR (Petition No 10 of 2013):</p> <p>the court awarded the sum of Kshs 17,000,000.00 to the estate of the petitioner as general damages for the violation of his constitutional right to liberty for a period of 9 months</p>
51.	<p>Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR (Constitutional Petition 441 of 2015)</p> <p>where the petitioners were awarded Kshs 20,000,000.00 each as damages for the violation of their rights under section 72 and 74 of the retired Constitution.</p>
52.	<p>Koigi Wamwere v Attorney General [2015] eKLR (Civil Appeal 86 of 2013)</p> <p>where the Court found that a lower sum than Kshs 12,000,000.00 for the violations under section 74 of the retired Constitution were patently inadequate.</p> <p>Pg 77</p>
53.	<p>Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR where the Supreme Court held that:</p> <p>“Just as in the Presidential election case, Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No. 5 of 2013, this matter provides for the Court a suitable occasion to consider further the subject of costs, which will continually feature in its regular decision-making. The public interest of constructing essential paths of jurisprudence, thus, has been served; and on this account, we would attach to neither party a diagnosis such as supports an award of costs.”</p>

	Pg 78
54.	<p>Mohamed Ali Baadi and others v Attorney General & 11 others [2018]</p> <p>eKLR:</p> <p>the Court crafted orders with timelines whereby the respondents were required to file affidavits that allowed the Court to monitor compliance with its judgment.</p> <p>Pg 78</p>
55.	<p>Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR</p>

DATED AT NAIROBI THIS 29TH DAY OF APRIL 2021




ALLAN ACHESA MALECHE and NYOKABI NJOGU
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